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No. 89-1591

IN THE
Supreme Court of the United States
October Term, 1989

THOMAS R. SCHWARZ,
Petitioner,

vs.

THE FLORIDA SUPREME COURT,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED

The respondent would restate the question presented as follows:

> Whether an integrated state bar, consistent with the First Amendment, can reserve the right to assert a position on an issue of great public interest that is likely to affect the rights of those who may come into contact with the judicial system if it provides a method for refunding a proportionate amount of the dues used to promote such position to members who disagree with it.

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STATEMENT OF THE CASE

In June 1987, petitioner, Thomas R. Schwarz, a member of the Florida Bar, filed a petition with the Supreme Court of Florida seeking to amend two of the Rules Regulating the Florida Bar (hereafter "Rules"). These proposed amendments are set forth in the appendix to the petition for writ of certiorari. (See P.A. 7-9) Mr. Schwarz sought to amend Chapter 2, Section 2-3.2(c)(4) of the Rules. Chapter 2 is entitled "Bylaws of the Florida Bar" and Section 2-3.2(c)(4) provided:

> 2-3.2 Powers
>
> Subject to the continued direction and supervision by the Supreme Court of Florida, the board of governors may, by amendment to this chapter, take all necessary action to:
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> * * * *
>
> (c) Establish, maintain and supervise:
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> * * * *
>
> (4) A program for providing information and advice to the courts and all other branches of government concerning current law and proposed or contemplated changes in the law.
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> * * * *

Mr. Schwarz's proposed amendment sought to limit such programs to the "organization, administration, funding, creation or supervision of the system of Courts or the licensing, admission to practice or disciplining of lawyers" and to prohibit Bar expenditures for "lobbying or public relations activity in association with any program...." (P.A. 7,8) The Board of Governors would be allowed to carry out those programs deemed permissible only by means of "written communications." *Id.*

Petitioner also sought to amend Chapter 2, section 2-10.2 of the Rules. This section permitted amendment of the Rules "by a majority vote of the members in good standing present and voting at any regular or special meeting of the Florida Bar...." Mr. Schwarz proposed an amendment deleting the "present and voting" requirement and substituting therefor a procedure enabling Bar members to cast ballots on proposed amendments by mail. (P.A. 11) The Florida Supreme Court denied this request in its order of June 2, 1988.[1] (P.A. 47, 51)

As relief, Mr. Schwarz's petition asked the Florida Supreme Court to appoint an independent commission to study and report on

> [T]he legality, propriety, scope and procedures, if any, through which this Court may exercise political power considering Articles I, II and V of the Florida Constitution, the Code of Judicial Conduct, and such other materials and ethical principles as it may deem appropriate.
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> * * * *

(P.A. 6)

In July 1987 the Florida Supreme Court, finding that the petition demonstrated a preliminary basis for relief, issued an order to the Florida Bar to show cause why the petition

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1 As we read the petition for certiorari, this proposed amendment and the Florida Supreme Court's action with respect thereto is not at issue. No mention of the proposed amendment or ruling thereon is made in petitioner's statement of the case or argument, although it is contained in petitioner's appendix. The Florida Supreme Court clearly declined to take action on the proposal on June 2, 1988, when it referred only the proposed amendment to Rule 2-3.2(c)(4) to the Judicial Council for study and recommendations and denied the remainder of the petition. (P.A. 47-51) To the extent Mr. Schwarz seeks review of the 1988 ruling, his petition is untimely and this Court lacks jurisdiction.

should not be granted. (P.A. 13) The Florida Bar filed a response to the petition, noting that pursuant to the decision of the Court of Appeals for the Eleventh Circuit in *Gibson v. The Florida Bar*, 798 F.2d 1564 (11th Cir. 1986), it had proceeded with the proposed adoption of a refund procedure that would allow dissenting lawyers to notify the Bar that they disagreed with a Bar legislative position and then receive that portion of their dues allotted to lobbying, and that the measure was then pending before the court as the *Florida Bar; Re: Amendment to Bylaw 2-9.3.* (P.A. 22-26) (The Florida Supreme Court subsequently adopted the refund amendment to Bylaw 2-9.3 and it is reproduced in petitioner's appendix (P.A. 31-33)).

In his reply to the Bar's response, Mr. Schwarz contended that his petition presented three issues with respect to the amendment of Rule 2-3.2(c)(4), two of which specifically concerned the proper interpretation of the Florida Constitution (P.A. 34,35), and the third his rights of association, specifically:

> [Whether] law licensees [may] be forced to associate with an Integrated Bar engaged in political activity beyond that in which the [Florida] Supreme Court has a specifically defined compelling State interest?

(P.A. 35)

Mr. Schwarz's arguments seemed to ask the Florida Supreme Court to define the scope of its permissible political activity *under the state constitution* and he contended that the Bar's engagement in politics "is inconsistent with separation of powers, an independent judicial department, and non-partisan selection, appointment, and retention of the judiciary." (P.A. 41) He further contended that his proposed amendment was *not* concerned with funding of political activities but was intended to prevent "any Bar political

activity beyond subject matters appropriate to the proper powers of this Court through the agency of the Bar." (P.A. 44)

The Florida Supreme Court referred the proposed amendment to Rule 2-3.2(c)(4) to the Florida Bar's Judicial Council for study and recommendations. (P.A. 47-51) *See The Florida Bar Re Schwarz*, 526 So.2d 56 (Fla. 1988). After holding public hearings, the Judicial Council recommended the following subject areas as appropriate for legislative activities of the Bar:

> (1) Questions concerning the regulation and discipline of attorneys;
>
> (2) matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency;
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> (3) increasing the availability of legal services to society;
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> (4) regulation of attorneys' client trust accounts; and
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> (5) the education, ethics, competence, integrity and regulation as a body, of the legal profession.

(P.A. at 54); *The Florida Bar Re Schwarz*, 552 So.2d 1094, 1095 (Fla. 1989).

The Judicial Council also recommended that the Bar be permitted to engage in legislative initiatives outside the above five, but only if:

> (1) The issue is recognized as being of great public interest;

(2) lawyers are especially suited by their training and experience to evaluate and explain the issue; and

(3) the subject matter affects the rights of those likely to come into contact with the judicial system.

(P.A. at 54,55); *The Florida Bar Re Schwarz*, 552 So.2d at 1095.

The Florida Supreme Court adopted all of the above recommendations as guidelines to be followed with respect to determining the scope of permissible legislative activities of the Florida Bar. (P.A. 60) In so acting, the court pointed out that the Rules required the Bar to focus specifically on the question of whether a given subject was one in which it could become involved and it cautioned the Board of Governors to avoid, to the extent possible, those issues "carry[ing] the potential of deep philosophical or emotional division among the membership of the Bar." (P.A. 59) The court also emphasized that any member in good standing of the Bar could readily question the propriety of any legislative position taken by the Board of Governors by timely filing a petition with the court. Finally, the court observed that in view of its amendment to Rule 2-9.3 any member of the Bar could obtain partial rebate of bar dues by registering his or her objection to legislative positions taken by the Florida Bar. In amending Rule 2-9.3, the Court stated that bar members could still bring injunctive actions against unauthorized bar activities and expenditures. *See The Florida Bar re Amendment to Rule 2-9.3*, 526 So.2d 688 (Fla. 1988).[2]

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2 As the court noted, the Bar must publish its adoption of a legislative position in the next issue of the Florida Bar News, a bi-weekly publication sent to each member of the Bar. (P.A. 59,60)

The decision of the Florida Supreme Court is, as it pointedly stated, much narrower than that of the California Supreme Court in *Keller v. The State Bar of California*, 47 Cal.3d 1152, 767 P.2d 1020, 255 Cal.Reptr. 542 (1989), *cert. granted*, ___U.S.___, 110 S.Ct. 46, 107 L.Ed.2d 15 (1989) (See P.A. 57). The California decision held that the California Bar was authorized to comment generally upon proposed legislation. It recognized no means by which a bar member could challenge the propriety of a legislative position nor any entitlement to a refund of bar dues, no matter the issue or the depth of disagreement.

SUMMARY OF ARGUMENT

Petitioner seeks review of a decision of the Florida Supreme Court adopting certain guidelines to be followed by the Florida Bar in its legislative activities. Assuming that a given legislative position asserted by the Bar is not within those fundamental purposes represented by guidelines 1-5, *ante* p. 4, any member of the Bar may seek a refund by following the procedure set forth in Rule 2-9.3.

Petitioner does not contest the constitutional adequacy of the procedures prescribed in Rule 2-9.3, and therefore presents no substantial federal question that would warrant this Court's review. This Court has considered whether a union may use compulsory dues assessed against non-member employees to support political activities that a non-member employee may oppose, *see Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Chicago Teacher's Union Local No. 1 v. Hudson*, 475 U.S. 292 (1986), and ruled that the union must provide a constitutionally adequate procedure by which a dissenter could seek a refund of those dues used to support the opposed political activity. Petitioner here not only fails to suggest that the Florida Bar's refund procedure is constitutionally defective, but he also fails to

cite or discuss *Abood* and *Chicago Teacher's Union* and to show that those cases are not dispositive of any constitutional issue raised by the decision of the Florida Supreme Court.

It also appears that petitioner seeks to have this Court decide whether the adoption of the guidelines is within the scope of authority of the Florida Supreme Court under the state constitution and whether the court properly delegated its authority. This is strictly an issue of state law. The petition utterly fails to show how such delegation of authority affects petitioner's constitutional rights if the court and the bar provide a refund procedure consistent with the rulings in *Abood* and *Chicago Teacher's Union*.

ARGUMENT

I. AN INTEGRATED STATE BAR DOES NOT VIOLATE THE FIRST AMENDMENT RIGHTS OF ASSOCIATION OF ITS MEMBERS BY RESERVING THE RIGHT TO ASSERT A POSITION ON ISSUES OF GREAT PUBLIC INTEREST AFFECTING THOSE LIKELY TO COME INTO CONTACT WITH THE JUDICIAL SYSTEM IF IT PROVIDES A METHOD FOR REFUNDING A PROPORTIONATE AMOUNT OF THE BAR DUES OF THOSE WHO DISAGREE WITH AN ASSERTED POSITION.[3]

In *Lathrop v. Donohue*, 367 U.S. 820 (1960), the plurality decision held that the Wisconsin integrated bar, whose membership requirement was limited to the compulsory payment of reasonable annual dues, did not by virtue of such requirement impinge upon "protected rights of association." *Id.* at 843. The question the Court left open was whether a bar member "may constitutionally be compelled to contribute his financial support to political activities which he opposed." *Id.* at 848; *see also, Id.* at 870 (Black, J., dissent-

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3 Respondent has restated the questions presented to reflect what it believes to be the single *federal* constitutional issue posed by the decision below. Respondent acknowledges it is uncertain whether the two questions presented, as stated and argued in the petition for writ of certiorari, raise any other federal constitutional issue. The scope of the Florida Supreme Court's power under the state constitution, and whether any delegation of that power is beyond its authority, issues seemingly raised by petitioner's second question, would be strictly questions of *state* law. The petition does not attempt to elucidate this issue. Should this Court decide to grant certiorari, it would be beneficial for the Court to state the precise issue it desires the parties to address.

ing).[4] Contrary to what petitioner contends is the justification for this Court's review, if a constitutional issue is posed by this case it is not the issue "postponed" in *Lathrop*. (*See* petition at 9.)

It is clear that at the time of the *Lathrop* decision, the Wisconsin Bar provided no means by which any bar member could request a refund of that part of his dues used to support political positions to which he objected. The Florida Bar, however, has adopted a procedure by which dissenting members may obtain a refund. *See* Rule 2-9.3 (P.A. 31) and *The Florida Bar re Amendment to Rule 2-9.3*, 526 So.2d 688 (Fla. 1988). Contrary to petitioner's claim, the decision below, which underscores a dissenting lawyer's right to a refund, is consistent with all controlling or analogous federal cases.[5]

In *Lathrop* this Court, citing *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956), drew an analogy between an integrated bar and compelled membership in a union. In neither case did it find that compelled membership as a condition of employment violated the First Amendment. More recent decisions, however, have addressed the issue of whether compulsory union dues may be spent on lobbying or political or ideological activities that are not germane to the union's fundamental purpose, i.e., collective bargaining. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), directly addressed this question, and the Court held that under the First Amendment non-union employees who were required to pay union dues under an agency shop agreement

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4 To avoid infringing the First Amendment rights of lawyers who disagreed with political positions taken by the Wisconsin Bar, Justice Black would have required a refund of the dues exacted to support the bar's political activities. 367 U.S. at 877.

5 The argument in the petition for certiorari does not attack, and in fact does not even mention, Rule 2-9.3. We therefore assume its constitutional adequacy as a refund procedure.

could not be compelled to support the union's ideological activities that were unrelated to collective bargaining. *Abood* made clear, however, that the union was free to undertake political activity on any issue of interest to it, as long as it did not finance such activity with the dues of the objectors. *See* 431 U.S. at 235-36.

The Court suggested at least two possible remedies for the dissenting employees in *Abood*: first, an injunction against expenditure by the union of a sum equal to the dissenters' pro rata share of the amount to be spent for the objectionable political activities; and second, restitution to the dissenters of a proportionate fractional share of the dues used for political purposes. *Id.* at 238. Although the Court did not explain the required remedy in detail, the *Abood* decision unarguably stands for the proposition that an appropriate refund procedure would cure any First Amendment objection.

In *Chicago Teacher's Union Local No. 1 v. Hudson*, 475 U.S. 292 (1986), this Court set forth the procedural safeguards to be followed by a union that engages in political activities supported by compulsory dues.[6] Because petitioner asserts no constitutional deficiency in the Florida Bar's refund procedure, it should suffice to say that the decision required the union to minimize the risk of using nonunion employees' contributions even temporarily for political purposes and to provide, as to any disputed amounts,

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6 Before setting forth the requisite protections the Court observed that "the procedures required by the First Amendment also provide the protections necessary for any deprivation of property." 475 U.S. at 304, n. 13. One of the two questions presented here, as phrased by the petitioner, makes reference to the Fifth as well as the First Amendment. Petitioner's Fifth Amendment claim, *if any*, is not given the slightest elaboration in the petition's argument. This brief will therefore not engage in speculative analysis of possible Fifth Amendment considerations.

a reasonably prompt decision by an impartial decisionmaker. The Florida Bar's refund provision, Rule 2-9.3, requires the Bar's executive director, upon receiving a written objection, to "promptly determine" the pro rata amount of the objector's dues at issue and to place that amount in escrow. (P.A. 31, 32) The escrow figure is to be independently verified by a certified public accountant. *Id.* The Board of Governors has 45 days to make a refund or to refer the matter to arbitration. The arbitration panel has 45 days to make its decision, and any refund must include interest at the legal rate from the date the objection was received. (P.A. 32, 33) The Bar bears the burden of proof in such proceedings. *See The Florida Bar Re Schwarz*, 552 So.2d 1094, 1098 (Fla. 1989).[7]

The petition for certiorari nowhere suggests that this Court's decisions on the use of union dues for political activities would not control the corresponding practices of an integrated bar. The petition cites but does not discuss the decision of the Eleventh Circuit in *Gibson v. The Florida Bar*, 798 F.2d 1564 (11th Cir. 1986), that relied on the paradigm of the "agency shop," as explicated by this Court in *Abood* and *Chicago Teacher's Union*, to hold that the

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7 Where a union routinely engages in political activity unrelated to its collective bargaining duties, it may, following proper procedures, deduct in advance from the dues owed by non-union employees a proportionate amount attributable to the political activity. *Abood, supra*, at 240; *Chicago Teachers Union, supra*. The Florida Supreme Court's decision below authorizes the Florida Bar to lobby in five specific areas that clearly relate to the Bar's stated purposes, an activity which, following the analogy to unions, may be supported by dues. Petitioner does not appear to disagree with the use of compulsory dues to support legislative initiatives in these five areas. The decision also allows lobbying on certain issues of "great public interest." Because this is a new guideline, no data exist that would support an advance deduction of objectors' dues, assuming *arguendo* the guideline allows political activity unrelated to the bar's stated purposes. The petition for certiorari does not contend an advance deduction is necessary.

Florida Bar could use compulsory dues to finance lobbying "only to the extent that it assumes a political or ideological position on matters that are germane to the Bar's stated purposes." 798 F.2d 1569. The Eleventh Circuit suggested a refund procedure as one possible remedy. *Id.* at 1570, n. 5. As a direct consequence of the *Gibson* decision, the Florida Supreme Court amended Rule 2-9.3 to provide for refunds and, by the decision below, limited most if not all lobbying activity to five subject areas clearly germane to the Bar's stated purposes.

Although it is far from clear in the petition for certiorari, Mr. Schwartz apparently objects to the guideline allowing the Bar to take a position on an issue of "great public interest." Whether the Florida Supreme Court intends to allow the Bar to lobby on an issue unrelated to the Bar's stated purposes remains to be seen. The court cautioned the Bar against interpreting the provision too broadly, and any such issue the Bar does address "must affect the rights of those likely to come into contact with the judicial system." But given the existence of the refund provision in Rule 2-9.3, how broadly or narrowly this criterion may be construed by the Bar or the court presents no constitutional issue. As the Eleventh Circuit stated in *Gibson*, relying on *Abood* and *Chicago Teacher's Union*:

> [T]he Bar may speak as a group *on any issue* as long as it does so without using the compulsory dues of dissenting members.

798 F.2d at 1570 (emphasis added).

As reasons for granting certiorari, petitioner contends that the Florida Supreme Court decided a federal question in conflict with decisions of federal courts of appeal as well as decisions of this Court, or, alternatively, decided an important question of federal law which has not been, but should be, settled by this Court. (Petition at 5) These con-

tentions are not borne out by the argument in the petition. Although petitioner cites a number of allegedly conflicting First Amendment cases decided by this Court, not one concerns a state bar's or union's use of compulsory dues to engage in political activities a member or forced contributor may oppose. The petition does not even cite or discuss this Court's decisions in *Abood, supra,* or *Chicago Teacher's Union, supra,* the cases most analogous, much less suggest how the decision below could conflict with them.

This Court's ruling in *Keller v. State Bar of California,* ___ U.S. ___, No. 88-1905, decided June 4, 1990, underscores the controlling effect of *Abood* and *Chicago Teacher's Union* in stating that "[w]e believe an integrated bar could certainly meet its *Abood* obligation by adopting the sort of procedures described in *[Chicago Teacher's Union v.] Hudson.*" Slip. op. at 14. The Court refrained from deciding "whether one or more alternate procedures would...satisfy that obligation" leaving the question "for consideration upon a more fully developed record." *Id.* As stated, the petition does not seriously question the Florida Bar's refund procedure. Hence, in offering this remedy, the Florida Bar has met its constitutional obligation under *Abood* and *Chicago Teacher's Union.*

Nor does the petition show any conflict with a decision of a federal court of appeals. Obviously, the adopted guidelines do not conflict with *Gibson, supra,* since, as a direct consequence of that ruling, any member of the Florida Bar may have a refund of dues used to support political positions he or she opposes. *See* 798 F.2d at 1569-70. Neither is there any apparent conflict with *Romany v. Colegio de Abogados de Puerto Rico,* 742 F.2d 32 (1st Cir. 1984), *on remand, Schneider v. Colegio de Abogados de Puerto Rico,* 682 F.Supp. 674 (D.P.R. 1988). There, the Puerto Rican Bar Association engaged in a wide range of ideological activities that it financed with compulsory dues. The Bar Association's remedy

for dissenting lawyers, ultimately found inadequate by the *district court* on remand, differed from that of the Florida Bar in many respects.[8] Petitioner does not compare the defective Puerto Rican remedy to that of the Florida Bar or suggest even in the most conclusory fashion that the Florida Bar remedy is inadequate. In view of the fact that a bar may speak out on *any issue* as long as it does so without using compulsory dues of dissenting members, *Gibson, supra*, at 1570, we submit this is a fatal defect in the petition.

The exact nature of the constitutional question presented here, and whether it is substantial, is conjectural at best. What the petition's conclusion finally asks this Court to do is not decide a specific question, but rather to "...require [the Florida Supreme Court] to define or define for the Florida court the meaningful and permissible limits of the scope, manner and method in intruding upon petitioner's First and Fifth Amendment rights." (Pet. at 10) The petition, however, fails to show how constitutional rights have been violated, fails to show conflict with any federal court decision, fails to even state a substantial and unsettled federal question it would have this Court address, and thus fails to meet the most basic criteria of Supreme Court Rule 17.1.

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8 For example, a member of the Puerto Rican Bar Association was not permitted to object to the use of compulsory dues for *any* of the bar's broadly and vaguely stated purposes. 682 F.Supp. 686-688. Moreover, the bar escrowed an arbitrary 15% of dues that dissenting attorneys could not claim until the end of the bar's fiscal year. *Id.* In contrast, the Florida Bar Rule provides the determination to be made by an impartial panel is whether the dues have been used for an acceptable purpose under *applicable constitutional law*, not just the Bar's rules. Any use for legislative activity on a question of "great public interest" could be challenged under this criterion. And, unlike the Puerto Rican rule, the Florida procedure is expeditious; a dissenting attorney does not have to wait a year, or possibly more, for the refund. (P.A. 32)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA was served in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States by depositing three true copies in a United States Post Office or mailbox, with first-class postage prepaid, addressed to:

Thomas R. Schwarz, Esquire
4561 Northwest 79th Avenue
Lauderhill, Florida 33351

_____/s/_____
LOUIS F. HUBENER
Assistant Attorney General